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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FREDERICK H. ODLE, an	)	Case No. CV 15-05019 DDP (JCx)
individual and as Trustees	)	
of the Frederick and Cynthia	)	
Odle 2013 Trust, Cynthia I.	)	
Odle, an individual and	)	<b>ORDER GRANTING DEFENDANTS' MOTION</b>
Trustees of the Frederick	)	<b>TO DISMISS AND DENYING</b>
and Cynthia Odle 2013 Trust,	)	<b>PLAINTIFFS' MOTION TO REMAND</b>
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Dkt Nos. 8, 10
MGC MORTGAGE INC.,	)	
	)	
Defendants.	)	
	)	
	)	

Presently before the court is Defendants MGC Mortgage, Inc. ("MGC") and LLP Mortgage, Ltd., Lp ("LLP")'s Motion to Dismiss. Having considered the submissions of the parties, the court grants the motion and adopts the following Order.

**I. Background**

In 2005, Plaintiffs obtained a \$560,000 refinance mortgage loan, secured by a Deed of Trust. (Complaint ¶ 12.) At some later time, Plaintiffs requested a loan modification from loan servicer

1 MGC. (Id. ¶ 16.) Plaintiffs submitted a complete loan  
2 modification application by November 2014. (Id. ¶ 18.) Plaintiffs  
3 have since "fallen behind on their monthly mortgage payments."  
4 (Id. 22.)

5 Plaintiffs allege nine causes of action, including violation  
6 of California Civil Code §§ 2923.7 and 2924.10, breach of contract  
7 and the implied covenant of good faith and fair dealing, negligence  
8 and negligent misrepresentation, promissory estoppel, and unfair  
9 business practices.<sup>1</sup> Plaintiffs allege that Defendants violated  
10 California Civil Code § 2923.7 by failing to update Plaintiffs  
11 about the status of their modification application and by providing  
12 "multiple and divergent points of contact." (Compl. ¶ 32.) The  
13 Complaint alleges that Defendants violated California Civil Code §  
14 2924.10 by failing to provide written acknowledgment of receipt of  
15 Plaintiffs' documents. (Id. ¶ 37.) Plaintiffs further alleges  
16 that Defendants breached the terms of the promissory note and deed  
17 by failing to "modify the loan if the law interpreted that the  
18 interest or other charges exceeds the permitted limits [on variable  
19 rate loans]." (Id. ¶¶ 44, 47.) Plaintiffs' negligence and  
20 promissory estoppel claims are premised upon allegations that MGC  
21 represented that it would "assist [Plaintiffs] to avoid  
22 foreclosure," and that Defendants then failed to review Plaintiffs'  
23 modification application. (Id. ¶ 63-64.) Defendants now move to  
24 dismiss the Complaint.

## 25 **II. Legal Standard**

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28 <sup>1</sup> Plaintiffs also allege a cause of action for cancellation of  
instruments, but do not oppose dismissal of that claim.

1 A complaint will survive a motion to dismiss when it contains  
2 "sufficient factual matter, accepted as true, to state a claim to  
3 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
4 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
5 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
6 "accept as true all allegations of material fact and must construe  
7 those facts in the light most favorable to the plaintiff." Resnick  
8 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
9 need not include "detailed factual allegations," it must offer  
10 "more than an unadorned, the-defendant-unlawfully-harmed-me  
11 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
12 allegations that are no more than a statement of a legal conclusion  
13 "are not entitled to the assumption of truth." Id. at 679. In  
14 other words, a pleading that merely offers "labels and  
15 conclusions," a "formulaic recitation of the elements," or "naked  
16 assertions" will not be sufficient to state a claim upon which  
17 relief can be granted. Id. at 678 (citations and internal  
18 quotation marks omitted).

19 "When there are well-pleaded factual allegations, a court should  
20 assume their veracity and then determine whether they plausibly  
21 give rise to an entitlement of relief." Id. at 679. Plaintiffs  
22 must allege "plausible grounds to infer" that their claims rise  
23 "above the speculative level." Twombly, 550 U.S. at 555.  
24 "Determining whether a complaint states a plausible claim for  
25 relief" is a "context-specific task that requires the reviewing  
26 court to draw on its judicial experience and common sense." Iqbal,  
27 556 U.S. at 679.

28 **III. Discussion**

1           A.     California Civil Code § 2923.7

2           California Civil Code § 2923.7 requires mortgage services to  
3 establish a "single point of contact" ("SPOC") for borrowers who  
4 request a "foreclosure prevention alternative," such as a loan  
5 modification. Cal. Civil Code § 2923.7(a). That point of contact  
6 can be a "team of personnel." Cal. Civil Code § 2923.7(e). The  
7 SPOC must communicate with the borrower about the application  
8 process, deadlines, missing documents, and the current status of  
9 the foreclosure alternative. Cal. Civil Code § 2923.7(b).

10          Plaintiffs have adequately alleged that MGC did not update  
11 them about the status of their loan modification application, and  
12 that no member of the SPOC team could give them a clear answer  
13 regarding their inquiries. However, California Civil Code §  
14 2924.12(c) provides that a "mortgage servicer . . . shall not be  
15 liable for any violation that it has corrected and remedied prior  
16 to the recordation of a trustee's deed upon sale . . . ." Cal.  
17 Civil Code § 2924.12(c). Here, the Complaint does not allege that  
18 any foreclosure activity has taken place, let alone the recording  
19 of a trustee's deed upon sale. Nor have Plaintiffs disputed  
20 Defendants' representation to the court that no foreclosure  
21 activity, including the recording of a notice of default, has  
22 occurred. Indeed, Plaintiffs do not address Defendants' arguments  
23 in this regard. Plaintiff's California Civil Code § 2923.7 claim  
24 is therefore dismissed. See Ellis v. Bank of America, N.A., No. CV  
25 13-5257 CAS, 2013 WL 5935412 \*4 (C.D. Cal. Oct. 28, 2013).

26          B.     Cal. Civil Code § 2924.10

27          The same logic applies to Plaintiffs' claim under California  
28 Civil Code § 2924.10. That statute requires mortgage servicers to

1 provide written acknowledgment of a borrow's modification  
2 application, as well as other information related to the  
3 modification application process. Cal. Civil Code § 2924.10(a).  
4 Plaintiffs allege that they submitted a complete loan application,  
5 and that an MGC representative confirmed on the phone that the  
6 application was complete. Once again, however, Plaintiff fails to  
7 address California Civil Code § 2924.12(c). Absent any foreclosure  
8 activity, Plaintiffs' California Civil Code § 2924.10 claim is  
9 dismissed.

10 C. Breach of Contract and Implied Covenant

11 The elements of a breach of contract claim are (1) the  
12 existence of a contract, (2) performance or excuse for  
13 nonperformance, (3) defendant's breach, and (4) damages. Oasis  
14 West Realty, LLC v. Goldman, 51 Cal.4th 811, 821 (2011); See also  
15 Rockridge Trust v. Wells Fargo, N.A., 985 F.Supp.2d 1110, 1141  
16 (N.D. Cal. 2013). Defendants argue that Plaintiffs have failed to  
17 allege all four of the required elements. The court agrees.

18 Although Plaintiffs' references to the "legal effect" of the  
19 contract are not clear in this context, it appears Plaintiffs refer  
20 to the note and deed as the contract in question. (Opposition at  
21 12; Compl. ¶ 43.) MGC, however, as servicer, was not a party to  
22 the note or deed. Nor is LLP's alleged breach clear to the court.  
23 Plaintiffs refer to "some agreement that Plaintiffs would receive a  
24 good faith loan modification review" and assert that Defendants  
25 "breached provisions within the note and deed of trust, in  
26 following applicable law & statute and simple common courtesy by  
27 misleading Plaintiffs into thinking they would be reviewed in good  
28 faith." (Opp. at 12.) At the same time, however, Plaintiffs

1 acknowledge that Defendants had no obligation to issue a loan  
2 modification. (Opp. at 3.) They do not, however, allege any other  
3 breach of a contractual provision.<sup>2</sup> Nor have Plaintiffs adequately  
4  
5 identified any excuse for nonperformance, alleging vaguely and  
6 conclusorily that "LPP and/or MGC's conduct prevented [Plaintiffs]  
7 from performing their obligation to the loan contract, thus they  
8 are excused from their own breach." (Compl. ¶ 49.) Lastly, and  
9 given the lack of any alleged breach, it is not apparent to the  
10 court how Plaintiffs were damaged. For these reasons, Plaintiffs'  
11 Fourth and Fifth causes of action are dismissed.

12 D. Negligence and Negligent Misrepresentation

13 The elements of a negligence claim are: (1) the existence of a  
14 duty to exercise due care, (2) breach of that duty, (3) causation,  
15 and (4) damages. Merrill v. Navegar, Inc., 26 Cal.4th 465, 500  
16 (2001). The "existence of a duty of care owed by a defendant to a  
17 plaintiff is a prerequisite to establishing a claim for  
18 negligence." Nymark v. Heart Fed. Savings & Loan Assn., 231  
19 Cal.App.3d 1089, 1095 (1991). "[A]s a general rule, a financial  
20 institution owes no duty of care to a borrower when the  
21 institution's involvement in the loan transaction does not exceed  
22 the scope of its conventional role as a mere lender of money."  
23 Nymark, 231 Cal. App. 3d at 1096.

24 Some courts have applied this logic to circumstances where a  
25 loan servicer offers to modify a borrowers loan, reasoning that the  
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27 <sup>2</sup> Contrary to Plaintiffs' admission here, the Complaint does  
28 allege that both MGC and LPP had an obligation to modify the loan.  
(Compl. ¶ 47.)

1 servicer's "involvement in the loan transaction does not exceed the  
2 scope of its conventional role as a lender of money." Deschaine v.  
3 IndyMac Mortg. Servs., 2014 U.S. Dist. LEXIS 8541, at \*17 (E.D.  
4 Cal. Jan. 22, 2014) (internal quotation marks omitted); see also  
5 Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096  
6 (1991). The Nymark rule, however, is not absolute, particularly in  
7 the loan modification context. California courts employ a six  
8 factor test to determine whether a financial institution owes a  
9 duty of care to a borrower, and look to "[1] the extent to which  
10 the transaction was intended to affect the plaintiff, [2] the  
11 foreseeability of harm to him, [3] the degree of certainty that the  
12 plaintiff suffered injury, [4] the closeness of the connection  
13 between the defendant's conduct and the injury suffered, [5] the  
14 moral blame attached to the defendant's conduct, and [6] the policy  
15 of preventing future harm." Nymark, 231 Cal. App. 3d at 1098  
16 (citing Biakanja v. Irving, 49 Ca.2d 647 (1958)).

17 California courts are currently divided as to the question  
18 whether lenders owe borrowers a duty of care in processing a loan  
19 modification. One court has held that lenders have a duty of care  
20 to reasonably process a loan modification application where it is  
21 foreseeable that failure to do so will result in significant harm  
22 to the borrower. Alvarez v. BAC Home Loans Servicing, L.P., 228  
23 Cal.App.4th 941, 948 (2014) (holding that lenders have a "duty to  
24 use reasonable care in the processing of a loan modification.").  
25 However, other courts have concluded that lenders do not owe a duty  
26 of care when considering a residential loan modification. Lueras  
27 v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 68 (2013)  
28 (holding that the defendant banks "did not have a common law duty

1 of care to offer, consider, or approve a loan modification, or to  
2 offer [the plaintiff] alternatives to foreclosure.") District  
3 courts in California have also reached different conclusions  
4 regarding this issue. See, e.g., Griffin v. Green Tree Servicing,  
5 LLC, No. CV 14-09408 MMM, 2015 WL 10059081 at \*14 (C.D. Cal. Oct.  
6 1, 2015) (noting split and concluding no duty exists); see also  
7 Robinson v. Bank of Am., No. 12-CV-494-RMW, 2012 WL 1932842, at \*7  
8 (N.D. Cal. May 29, 2012); Ansanelli v. JP Morgan Chase Bank, N.A.,  
9 No C 10-3892 WHA, 2011 WL 1134451, at \*7 (N.D. Cal. Mar. 28, 2011);  
10 Watkinson v. MortgageIT, Inc., No. 10-CV-327-IEG, 2010 WL 2196083  
11 (S.D. Cal. June 1, 2010); Garcia v. Ocwen Loan Servicing, LLC, No.  
12 C 10-290 PVT, 2010 WL 1881098, at \*1-3. (N.D. Cal. May 10, 2010).

13 Here, Plaintiffs identify the Biankaja factors, but do not  
14 specifically discuss how the facts of this case apply. Although  
15 the balance of factors is somewhat close, the court concludes that  
16 there was no duty of care here. A loan modification may have  
17 affected Plaintiffs insofar as it determined whether they would be  
18 able to keep their home or what other efforts they undertook to  
19 retain possession. The potential harm to Plaintiff, namely default  
20 and foreclosure, from the failure to review Plaintiffs' application  
21 was foreseeable. As discussed above, however, it is unclear  
22 whether Plaintiffs have been injured, as no foreclosure activity  
23 has taken place. Plaintiffs' allegations are not sufficiently  
24 detailed for the court to make a determination as to the fifth,  
25 moral blame factor, although the court notes that, in light of the  
26 lack of any foreclosure activity, there does not appear to have  
27 been any kind of dual tracking here. But see Alvarez, 228 Cal.  
28 App. 4th at 949 ("The borrower's lack of bargaining power coupled



1 with conflicts of interest that exist in the modern loan servicing  
2 industry provide a moral imperative that those with the controlling  
3 hand be required to exercise reasonable care in their dealings with  
4 borrowers seeking a loan modification.") Imposition of a duty under  
5 these circumstances would do little to prevent future harm, as no  
6 harm appears to have occurred.

7 Under the circumstances here, Defendants did not have a duty  
8 to Plaintiffs. The Sixth and Seventh causes of action are  
9 dismissed.

10 E. Promissory Estoppel

11 The elements of promissory estoppel claim are: "(1) a promise  
12 clear and unambiguous in its terms; (2) reliance by the party to  
13 whom the promise is made; (3)[the] reliance must be both reasonable  
14 and foreseeable; and (4) the party asserting the estoppel must be  
15 injured by his reliance." Advanced Choices, Inc. v. Dep't of  
16 Health Servs., 182 Cal. App. 4th 1661, 1672 (2010). Defendants  
17 contend that Plaintiffs have not sufficiently identified what the  
18 promise at issue was, or who made it. (Motion at 16.) As to the  
19 substance of the promise, the court disagrees. The Complaint  
20 sufficiently alleges that Defendants promised that the loan  
21 modification application was being reviewed on the merits, that  
22 Defendants expressly represented that they would engage in  
23 negotiations for the purpose of modifying the loan, and that such  
24 negotiations would prevent foreclosure. (Compl. ¶¶ 84, 87.) The  
25 court agrees, however, that the Complaint is unclear as to who made  
26 these promises to Plaintiffs. Although it would appear that  
27 Plaintiffs only interacted with MGC representatives, the promissory  
28 estoppel cause of action is alleged against both MGC and LLP, and

1 refers to Defendants in the plural. For this reason, the Eighth  
2 Cause of Action is dismissed.

3 **IV. Conclusion**

4 For the reasons stated above, Defendants' Motion to Dismiss is  
5 GRANTED.<sup>3</sup> Plaintiffs' Complaint is DISMISSED, with leave to amend.<sup>4</sup>  
6 Any amended complaint shall be filed within fourteen days of the  
7 date of this Order. Plaintiffs' Motion to Remand (Dkt.10) is  
8 DENIED.<sup>5</sup>

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10 IT IS SO ORDERED.

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14 Dated: May 16, 2016

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DEAN D. PREGERSON  
United States District Judge

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21 <sup>3</sup> Having dismissed all other causes of action, the court also  
22 dismisses Plaintiffs' derivative unfair business practices claim.

23 <sup>4</sup> The court's grant of leave to amend should not be read to  
24 suggest that any cause of action will or will not be viable upon  
25 amendment. Plaintiffs are advised to take care that any amended  
26 cause of action address the deficiencies described in this Order.

27 <sup>5</sup> Plaintiffs fail to address the argument that they seek to  
28 enjoin any future foreclosure activity. When a plaintiff attempts  
to enjoin a defendant from exercising a right to foreclose, which  
in effect prevents the defendant from recouping any losses caused  
by the plaintiff's failure to make payments, the amount in  
controversy may be measured by the value of the property. See,  
e.g., Zepeda v. U.S. Bank, N.A., No. SACV 11-0909 DOC, 2011 WL  
4351801 \*3-4 (C.D. Cal. Sept. 16, 2011).